SUPREME COURT, U. S.

DEC 13 19

MICHAEL RODAK, JR.

In the Supreme Court of the United States

October Term, 1974
No. 74-590

PREMISES OF RICHARD KASTNER, t/a LIBERTY BELL DISCOUNT and CHARLES PODHAIZER, t/a BIG C DISCOUNT DEPARTMENT STORE, Tenant, DESCRIBED IN DEED BOOK 1725, Page 231, *Petitioners*

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, *Respondents*

In Re: Condemnation by the Commonwealth of Pennsylvania, Department of Transportation (Formerly Department of Highways), for Right-of-Way for Legislative Route 252, Sec. 10-A, in Bensalem Township, Bucks County, Pennsylvania.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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OPINIONS BELOW

The judgment of the Supreme Court of Pennsylvania is unreported and is No. 1478 Allocatur Docket. The opinion of the Commonwealth Court of Pennsylvania, which reversed the decision of the Court of Common Pleas of Bucks County in dismissing Petitioner's claim, is reported in 13 Commonwealth Ct. Rptr. 525 (1974). The opinion of the Court of Common Pleas of Bucks County, Pennsylvania, is reported in 24 Bucks County Law Rptr. 163 (1973). The Commonwealth Court reversed the judgment of the Court of Common Pleas of Bucks County, Pennsylvania, which had remanded the case to the Board of View. Petition for allowance of appeal from the Commonwealth Court of Pennsylvania to the Supreme Court of Pennsylvania, was denied by said Supreme Court on August 26, 1974.

JURISDICTION

The Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Where the Commonwealth of Pennsylvania, Department of Transportation has constructed a new highway (New Street Road), where the original highway is barricaded at the intersection of Old Street Road and U.S. 1, forming a cul-de-sac, where no land has been taken, where the property in question does not abut the new improvement, and where those utilizing the subject property need travel only a short distance in order to reach the general system of highways, does a decision of the Commonwealth Court of Pennsylvania denying liability, effect a denial of just compensation under the Fifth Amendment, or a denial of due process under the Fourteenth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> ". . . nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

COUNTER-STATEMENT OF THE CASE

Petitioner's property is located on the north side of what is commonly known as Old Street Road (Legislative Route 252), approximately two hundred fifty feet east of Route 1 (Legislative Route 281). Prior to 1969 Old Street Road intersected Route 1. In 1969 construction began on the relocation of Street Road. New Street Road was laid out to the north of Old Street Road, and, as part of the traffic engineering plans for Street Road and Route 1, Old Street Road was barricaded just to the east of the intersection of Old Street Road and Route 1, resulting to the dead-ending of Old Street Road.

Before these changes were made, the property could be reached in the following ways; vehicles traveling south on Route 1 made a left-hand turn into the subject property. Vehicles traveling north on Route 1 made a right-hand turn onto Street Road and then a left-hand turn into the subject property. Vehicles traveling east on Street Road made a left-hand turn into the property and those traveling west made a right-hand turn.

Because the intersection of Old Street Road and Route 1 is no longer open, access to the subject property has been affected in the following ways: vehicles traveling south on Route 1 turn right off Route 1 onto a jug handle, proceed under Route 1 to Kingston Way, make a right turn at Kingston Way which runs into Old Street Road, make another right-hand turn onto

Old Street Road and then a right-hand turn into the subject property. This is a distance of approximately one mile.

Vehicles traveling north on Route 1 have a choice of routes to arrive at the subject property. One route is similar to that used by vehicles traveling south. The traffic can use a ramp from Route 1 to Street Road, proceed to Kingston Way, Old Street Road and the subject property. This is a distance of seven-tenths of a mile. Another way is to turn right off Route 1 at the first traffic light south of Street Road and drive along Old Trevose Road, Windsor Drive and Craeton Drive to the subject property, a distance of about nine-tenths of a mile from Route 1. An alternate use of this route would be to make a right-hand turn at the first street north of the intersection with the traffic light, proceed onto Windsor Drive in an easterly direction, then north on Craeton Drive to Old Street Road and then to the entrance of the subject property, seven-tenths of a mile from Route 1.

Vehicles traveling east on New Street Road would pass under Route 1 and make a right-hand turn onto Kingston Way, from there to Old Street Road and the subject property, a distance of approximately nine-tenths of a mile.

Vehicles traveling west on New Street Road would make a left-hand turn onto Kingston Way and then proceed to Old Street Road and the subject property. This is a distance of three-tenths of a mile. All of these additional distances are as estimated by the Pennsylvania Department of Transportation.

No land of the Petitioner herein was condemned or appropriated and, Petitioner's property does not abut the improvement on New Street Road.

On November 25, 1970, the Commonwealth of Pennsylvania, Department of Transportation, was served with a copy of a petition for appointment for a Board of View, along with a copy of an order for appointment of Board of View. The Board of View was appointed and the view of the premises set for January 4, 1971 was continued pending the outcome of the Commonwealth's preliminary objections.

Preliminary objections were overruled and a hearing was held before the Board of View on July 16, 1971 for the taking of testimony. Petitioner's property has not been condemned. Their petition was brought pursuant to Sections 612 and 613 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, P. L. 84, 26 P.S. §612, §613, which permit recovery for interference with access where the property in question has not been formally condemned.

At the Viewers' hearing, the Commonwealth presented no testimony on damages. Petitioner herein presented the testimony of two witnesses, who testified that the resultant damages to claimants amounted to $340,000.00 and $350,000.00, respectively. The Viewers found that Petitioner was not entitled to damages under the aforesaid sections of the Eminent Domain Code.

Petitioner herein appealed from and objected to the Viewers' report, basing their appeal on Section 517 of the Eminent Domain Code. The Court of Common Pleas of Bucks County found that the activities of the

Commonwealth resulted in a "taking" or compensable injuries to claimants' property, modified the Viewers' report accordingly, and directed that the case be resubmitted to the same Board of View for the purpose of taking additional testimony on the amount of damages to which claimants are entitled. As the action of the Court of Common Pleas was a "final order" within the purview of Section 517 of the Eminent Domain Code, the Commonwealth then appealed that order to the Commonwealth Court of Pennsylvania. On May 20, 1974 said Commonwealth Court unanimously reversed the decision of the Court of Common Pleas of Bucks County, and judgment was entered for the Commonwealth; subsequently, the Petitioner herein petitioned the Supreme Court of Pennsylvania for allowance of appeal from said judgment of the Commonwealth Court. On August 26, 1974 the said Petition was denied per curiam.

ARGUMENT

Where the Commonwealth of Pennsylvania, Department of Transportation has constructed a new highway (New Street Road), where the original highway is barricaded at the intersection of Old Street Road and U.S. 1, forming a cul-de-sac, where no land has been taken, where the property in question does not abut the new improvement, and where those utilizing the subject property need travel only a short distance in order to reach the general system of highways, a decision of the Commonwealth Court of Pennsylvania denying liability, does not effect a denial of just compensation under the Fifth Amendment, or a denial of due process under the Fourteenth Amendment of the United States Constitution.

The question presented by the Petitioner is extraordinarily misleading in several respects:

A. The Commonwealth did not vacate the entirety of the street upon which the Petitioner's property abuts, but only barricaded the said street, Old Street Road, slightly to the east of the intersection of that street and Route 1, which resulted in a cul-de-sac. Ingress and egress from Old Street Road to the property and from the property back to Old Street Road, remain unchanged, and of course, as the facts indicate, access to the general system of highways (New Street Road) is readily available to the subject property by

the expedient of traveling east on Old Street Road and making a right-hand turn onto Kingston Way which leads to New Street Road.

B. Inherent in the question is a statement, as a fact, that there was a substantial interference with access as a result of the Commonwealth's activities. The Commonwealth Court of Pennsylvania held precisely the opposite and found that this was an inconvenience of access, nothing more, and that if there was an alteration in the highest and best use, and a diminution in the value of the property, it was the result of a diversion of traffic from relocated Old Street Road onto New Street Road, a modern four-lane facility.

C. The statement inherent in the question, that Petitioner has sustained damages in the amount of $360,000.00, is purely self-serving in that it represents testimony presented only at a Viewers' hearing by the Petitioner. The Commonwealth, taking the position that there was no cause of action, this position to be upheld later by the Commonwealth Court and the Supreme Court of Pennsylvania, did not present testimony relative to damages.

The Commonwealth submits that it has not violated the Fifth Amendment of the United States Constitution because it has not taken private property or property rights for public use, relating to the subject property, within the purview of the Eminent Domain Code of Pennsylvania, or well established case law in Pennsylvania and other jurisdictions. The Commonwealth further submits that it is not in violation of the Fourteenth Amendment of the United States Constitution in that is has not deprived the Petitioner of prop-

erty, and that certainly there has been due process of law, this matter having been heard by the Viewers, by the Court of Common Pleas of Bucks County, by the Commonwealth Court of Pennsylvania, and having been presented to the Supreme Court of Pennsylvania and rejected by that tribunal.

The Commonwealth finds itself in complete agreement with the statement made in Petitioner's brief on page 8 thereof: "It is obvious that not every property owner who suffers a loss in value of his property has a constitutional right to just compensation, even if the loss is occasioned by the construction of a new highway." This is clearly one such case.

Of course, the Commonwealth is liable for the consequences of a substantial interference with access; this is clearly spelled out in §612 of the Eminent Domain Code; however, under the facts no such interference can be deemed to have occurred. No land has been condemned or otherwise acquired from the Petitioner, and the Petitioner does not abut the improvement on New Street Road, a requirement for consequential damages under any circumstances, within the purview of §612 of the Eminent Domain Code. The subject property is, as stated, some 300 feet distant from the intersection which was barricaded, and this had the effect of diverting traffic onto New Street Road. This hardly constitutes being rendered "slightly short of totally landlocked." The Petitioner, having frontage on Old Street Road had two directions available to him in which to travel, and not four as alleged. Upon leaving the property, he could travel either east or west which was the direction of the intersection

with U.S. No. 1. Following construction, he still has the ability to make a left-hand turn onto Old Street Road travel a short distance east, at which time he may arrive at the general system of roads which take him speedily in any direction he chooses.

The Petitioner says on page 8 of his brief that the State Courts, in considering the national standard of the constitution requirement of just compensation, have reached varying results. This statement is so broad as to be virtually meaningless. While every state has acknowledged its obligation to fulfill its constitutional requirement of just compensation, quite naturally in fifty jurisdictions there has been some difference of opinion with regard to what constitutes an interference with access. The fact is, the Commonwealth of Pennsylvania, and at least ten other states uniformly hold that the creation of a cul-de-sac, with no taking of land, and which allows a reasonable means of access to the system of highways, is not a taking, injury or destruction, and gives rise to no cause of action in eminent domain.

The Courts in Pennsylvania, contrary to the statement by the Petitioner, have by no means differed with regard to circuity of access, as opposed to interference, with access generally, and with regard to the creation of the circuitous situation known as a cul-de-sac, specifically. *In re: Melon Street,* 182 Pa. 397, 38 A. 482, decided in 1897, and relied upon heavily in previous arguments by the Petitioner herein was overruled 36 years later in *Fecher v. Allegheny County,* 313 Pa. 191, 169 A. 87 (1933). The Court, in that case stated:

> "The basis of Plaintiff's complaint on the score of deprivation of access is that it is now necessary for one to travel a slightly greater distance from her property than formerly in order to reach the main highway at the site of the crossings. It must now be regarded as a settled fact that such a situation cannot of itself give rise to a claim for damages. The underlying principle is damages will not be allowed where the effect of disturbance to the highway is merely to cause the owner to travel a short distance further in order to reach the system of streets in that direction."

This principle has been strengthened in Pennsylvania over the years and is the law today.

The leading cases in Pennsylvania are *Wolf v. Department of Highways,* 422 Pa. 34, 220 A. 2d 868 (1966); *Mitchell Condemnation Case,* 209 Pa. Superior Ct. 288, 228 A. 2d 53 (1967), and *Hession Condemnation Case,* 430 Pa. 273, 242 A. 2d 432 (1968), cert. denied in 393 U.S. 1049. In the *Mitchell* case, supra, where damages were sought for the result of the vacating of a road near the claimant's property, and denied, the Superior Court of Pennsylvania relied upon a California case, *Breidert v. Southern Pacific Company,* 39 Cal. Rptr. 903, 61 Cal. 2d 659, 394 P. 2d 719 (1964). In the *Hession* case, supra, the Supreme Court of Pennsylvania, cites a Missouri case, *State Highway Commission of Missouri v. Meier,* 388 S.W. 2d 855 (1965), cert. denied in 382 U.S. 846. That case set the standard for the three leading Pennsylvania cases cited above, in stating:

> "An abutting property owner's right to access . . . includes the further right to connect with or reach the system of public highways . . . The right does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right of way because, after one is upon the highway he has the same right as all other travelers and the right of travel is a public right and controlled by the police power of the state."

Other jurisdictions with identical holdings as those of the leading Pennsylvania cases are New Mexico: *State ex rel. State Highway Commission vs. Silva,* 71 N.M. 350, 378 P. 2d 595 (wherein *Re Melon Street* was specifically rejected); Wisconsin: *Stefan Auto Body v. State Highway Commission,* 21 Wisc. 2d 263, 124 N.W. 2d 319 (1961); Kansas: *Brook v. State Highway Commission,* 195 Kan. 361, 404 P. 2d 934 (1965); Minnesota: *State by Mondale vs. Gannons, Inc.,* 275 Minn. 14, 145 N.W. 2d 321 (1966); Nebraska: *Berlowitz vs. State Department of Roads,* 180 Neb. 164, 141 N.W. 2d 764 (1966); North Carolina: *State Highway Commission vs. Wortman,* 4 N.S. App. 546, 167 S.E. 2d 462 (1969); Arizona: *State ex rel. Herman vs. Schaffer,* 105 Ariz. 478, 467 S.W. 2d 66; California: *People by Department of Public Works vs. Becker,* 262 Cal. App. 2d 634, 69 Cal. Rptr. 110 (1968); and Idaho: *James vs. State,* 88 Idaho 397 P. 2d 766 (1964).

The Commonwealth Court of Pennsylvania in reversing the decision of the Court of Common Pleas of Bucks County, makes it clear that both that Court

and the Petitioner herein have confused loss of access and diversion of traffic, in taking the position that damages were payable, when by the demonstrable facts, traffic has been diverted onto a parallel, competing highway, as a result of construction of said highway and the placement of a barricade creating a cul-de-sac on the highway on which the Petitioner's property fronted. Thus, however much the Petitioner herein may protest that his claim is not based upon diversion of traffic, the facts themselves lead inescapably to this conclusion. The Commonwealth Court on page 5 of its opinion states:

> "The following quotation from Hession could just as readily have been written of this case and its record:
>
> 'The record before the viewers makes it evident that the damage suffered by appellees is a product of the fact that the elevated highway has transformed what was once a heavily traveled highway (State Road) into a street which carries primarily local traffic only.[1] In essence, appellees base their claim on a belief that the change in the traffic pattern caused by the construction of the expressway and the concomitant decrease in the

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[1] Prior to the construction of the elevated highway, State Road was used to avoid heavy traffic on both Torresdale and Frankford Avenues. The testimony of appellees' two real estate appraisers makes it evident that their estimates of the damage suffered is based totally upon loss of traffic. One appraiser characterized the present location of appellees' tavern restaurant as "inconspicuous" while the other stated that the elevated highway had destroyed all "profitable use" of the premises.'

value of their land as a business property is compensable; they urge this Court to distinguish between properties used for business purposes and those employed as residences and contend that business establishments do have a compensable interest in the traffic pattern existing before a street has been vacated. This argument was considered and expressly rejected in Wolf v. Department of Highways, 422 Pa. 34, 220 A. 2d 868 (1966).' 430 Pa. at 278-9, 242 A. 2d at 434-5."

Since, in both the *Hession* case and the present one, a heavily traveled State highway was converted into a street which carries primarily local traffic only, it is well to point out, as does the Petitioner at the bottom of page 10 on his brief, that certiorari was denied in the *Hession Condemnation Case,* 393 U.S. 1049 (1969). Inasmuch as the *Hession* case is squarely in point with the present one, the Commonwealth submits that this Honorable Court would have no reason to entertain certiorari.

While the series of federal cases cited by the Petitioner are of interest academically, all of them are factually dissimilar to the present case, none of them are in point, and in no manner establish that the Commonwealth has violated either the Fifth or Fourteenth Amendment of the United States Constitution, by changing the traffic flow on the highway upon which the subject property abuts.

In *Martin v. Creasy,* 360 U.S. 219 (1959), the distinction between that case and the present one is quite obvious. In that case there was an attempt to obtain injunctive relief by *abutting* (emphasis supplied)

property owners, and to have the "Pennsylvania Limited Access Highway Act" declared unconstitutional. The court was there concerned with the constitutionality of a statute, as opposed to the constitutional right of just compensation. This Honorable Court held that where the Pennsylvania State Courts had determined that the statute in question provided an adequate procedure, consistent with the due process requirements of the United States Constitution, whereby property owners, fronting on such a highway, rendered limited access by the Commonwealth, could seek damages, then, this Court would have no reason to adjudicate. *Creasy v. Lawler,* 8 Pa. D. & C. 2d 535 (1956), was the Court of Common Pleas decision on *Martin v. Creasy,* supra. There the court held that the "Limited Access Highway Act" is constitutional, since it contains a procedure whereby affected property owners may litigate on the question of compensation for loss of access. Again, this is in no way factually related to the present case. In *Creasy v. Stevens,* 160 Fed. Supp. 404 (1958), the federal District Court granted an injunction on activity under the "Limited Access Highway Act", on the ground that it was in violation of the due process clause of the Fourteenth Amendment. On appeal to this Honorable Court, the decision was reversed, under the citation earlier mentioned, *Martin v. Creasy,* 360 U.S. 219 (1959), because as stated, there was indeed a procedure for the preservation of the rights of the property owners, and therefore no violation of the Fourteenth Amendment of the United States Constitution. The reason for the inclusion of the *Creasy* cases is obscure. If anything, they solidify the attitude of this Honor-

able Court in not wishing to intervene with respect to the merits of a given eminent domain case, as concerns the compensability of an element of damage, or indeed, whether or not there is a cause of action, so long as the claimant has full access to the courts for the purpose of endeavoring to establish his claim. As this Court states in *Martin v. Creasy,* 360 U.S. 219, on page 234: "There is no reason to suppose that the Commonwealth of Pennsylvania will not afford full constitutional scope to the statutory phrase 'actual taking of property'."

In his brief on page 14, the Petitioner herein makes reference to a statement made by the attorney for the Commonwealth in his brief in the *Hession* condemnation case, supra, where, although such facts are not involved in the *Hession* case, a statement is made to the effect that the creation of a cul-de-sac would be compensable. In addition, the Petitioner has filed a copy of the Commonwealth's brief in the *Hession* case together with his petition. The Commonwealth submits that such a reference is a highly improper one in several respects. The opinion was personal to the attorney drafting the brief in the *Hession* case, was directly contrary to existing case law in the State of Pennsylvania, and the Commonwealth Court, in deciding the case at bar, clearly understood this in ignoring the comment, which was called to its attention. As a matter of fact it is that very decision, the *Hession* case, upon which the Commonwealth Court bases a good deal of its reasoning. Even assuming that there is any degree of propriety in discussing a statement made in a brief in another case, rather than the law of Pennsylvania, it should

then be noted that the statement contains the following: "In order for recovery to be had when a street is vacated, but no land is taken, the property owner must be left in a position which is *unique and substantially different* than that of his neighbors and the public generally." (Emphasis supplied.) The Petitioner can hardly be said to be in a unique and substantially different position than that of his neighbors, when in fact Old Street Road contains four other properties, all of which are now on a street which contains a cul-de-sac on one end, and allows access to the general system of streets on the other.

Chicago B & Q R Company v. Chicago, 166 U.S. 226 (1897), and *Duncan v. Louisiana,* 391 U.S. 145 (1968), cited by the Petitioner in support of the proposition that a taking in a constitutional sense is not limited to an actual physical possession or seizure, are not disputed by the Commonwealth in terms of the general principle. The Eminent Domain Code of Pennsylvania makes it quite clear that under certain enumerated circumstances, damages are payable in Eminent Domain without a physical appropriation of the property. The creation of a cul-de-sac is not one such circumstance. *Duncan v. Louisiana,* 391 U.S. 145 (1968), cited by the Petitioner, is a criminal case where, although the defendant stood accused of a crime punishable by a maximum of two years imprisonment and a $300.00 fine, he was nevertheless entitled to a jury trial, within the purview of the Fourteenth Amendment of the United States Constitution. *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922), cited by the Petitioner, was a case where the act involved was declared unconstitutional because it did

not provide for compensation. Contrary to the statement made by Petitioner herein, the act did more than "merely prohibit underground mining". Under the facts in the case, there was the taking of a substantial subsurface property interest. Another case relied upon by the Petitioner is the *United States v. General Motors,* 323 U.S. 373 (1945), which was a federal eminent domain action, where condemnor temporarily occupied a portion of a leased building, and there, quite predictably, the court held that the Fifth Amendment of the United States Constitution required the payment of compensation.

That low-flying aircraft can cause compensable damage to property, is not herein disputed, and where in *United States v. Causby,* 328 U.S. 256 (1946), military aircraft destroyed the subject property's use as a commercial chicken farm, it was held that compensation was payable. Of course, the Court was quick to point out that these damages "were the product of a direct invasion of condemnee's domain". In the present case there is no invasion, direct or indirect. Similarly, in a case cited by the Petitioner herein, *Griggs v. Allegheny County,* 269 U.S. 84 (1962), where low-altitude flights over a private home destroyed the possibility of peaceful enjoyment of this property, this destruction was held to be compensable. It is apparent that all of the federal cases cited by the Petitioner in support of his position are so alien to the factual circumstances in the present case, as to be of no value whatever in determining the constitutional right to damages, where in fact nothing more has occurred than a diverting of traffic.

The Commonwealth of Pennsylvania has set forth clear and definitive standards, under Section 612 and Section 613 of the Eminent Domain Code of 1964, as amended, for the compensability of the legitimate interference with access in the absence of a taking of land, and has clearly established by this act and by case law, the distinction between such an interference and a factual circumstance, following construction, where the property owner has a reasonable means of access to the general system of highways. The Petitioner has such a reasonable means of access, and need travel only several hundred feet in order to reach the system. He is therefore not an innocent victim of progress, as alleged, but a property owner seeking to assert a constitutional right that does not exist; namely, the right to the flow of traffic that originally passed his door. The Commonwealth submits that there are indeed guidelines with respect to the right to damages of a landowner, as a result of highway construction, relocation and vacation, and trusts that this Honorable Court will leave the implementation of such guidelines to the sound discretion of the state courts.

CONCLUSION

Therefore, your respondent, the Commonwealth of Pennsylvania acting through its Department of Transportation, respectfully prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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